

**Contingency Contracting (CON 234)**  
**Read-Ahead Assignment**

FAR

1.4, 1.6, 1.7  
4.801, 4.802, 4.803, 4.804  
  
5.1, 5.2  
6.0, 6.1, 6.2, 6.3  
7.4  
11.6  
12.5, 12.6  
13 (all)  
15.402, 15.406  
16.1, 16.301, 16.404-2, 16.5, 16.6  
  
25 (all)  
32.0, 32.1, 32.2, 32.4  
33.104, 33.2  
42.1, 42.2, 42.3  
43.1, 43.2  
47.304-3, 47.304-4, 47.304-5  
49.101, 49.103, 49.105, 49.108-7, 49.109-4,  
49.109.6  
50.1, 50.2, 50.3

DFARS

201.4, 201.6  
204.670-2, 204.670-3, 204.802,  
204.804, 204.70  
  
206.302, 306.303  
207.4  
  
212.5  
213 (all)  
  
  
217.74  
225.000-71  
  
  
242.101  
  
  
  
250.201

In addition, read the appropriate Contingency Contracting Supplement for your service:

Army:	AFARS Manual No. 2
Air Force:	AFFARS Appendix CC
Navy:	Navy Contingency Contracting Handbook
Marine Corps:	MCO P4200.15, Appendix B
DLA:	DLA Directive 5000.4, Part II, Chapter 12, Contingency Contract Administration Services

## Types of Contingencies STUDENT TEXT

### Definition of Contingency

1. Declared Contingency. In accordance with 10 USC 101(a)(13) a “contingency” operation of the DoD may be declared either by,

a. The Secretary of Defense when members of the Armed Forces may become involved in military actions against an enemy of the United States or

b. The President or the Congress when members of the uniformed forces are called on active duty [a reserve component mobilization] under Title 10, United States Code, or any provision of law during a declared war or national emergency.

The formal declaration of a contingency operation is very significant for the CCO. The declaration of a contingency triggers invocation of 10 USC 2302(7) which raises the SAT to \$200,000 for “...any contract to be awarded and performed or purchase made, outside the United States in support of a contingency operation...”.

2. Nondeclared contingency. This is all other contingency operations of DoD other than that described in paragraph ‘1a’ above.

3. Contingency Contracting. At this time there is not universal agreement as to a precise definition of this term. However, for purposes of CON 234, contingency contracting is defined as:

“Direct contracting support to tactical and operational forces engaged in the full spectrum of armed conflict and Military Operations Other Than War, both domestic and overseas.”

a. This definition is purposely broad enough to include four *types* of contingencies: Major Regional Conflicts, Lesser Regional Conflicts, Military Operations Other Than War, and Domestic Disaster/Emergency Relief (these terms will be defined later in this text).

b. It is also purposely exclusive of: military training exercises, routine installation and base operations, and systems/inventory control point contracting, both CONUS and OCONUS. Each of these excluded types of contracting can, under certain conditions, be quite similar to “contingency contracting” as defined for CON 234. However, what each of the exclusions lack is the element of *immediate risk* to human life or significant national interests.

c. Contingency Contracting, as defined for this course, may or may not be in support of a “contingency” operation as defined by 10 USC 101(a)(13).

### **Sources of Authority to Perform Contingency Contracting**

4. The following documents are the primary sources of authority and direction for performance of the contingency contracting mission:

Air Force -- AFFAR Supplement Appendix CC  
Army -- AFARS Manual No. 2  
Navy -- NAVSUP Instruction 4230.37A  
Marines -- (MCO P4200.15-Appendix B)

5. These manuals can be found in the Reference Book supplement to CON 234 and will be referred to frequently throughout the course.

### **Types of Contingencies that DoD Contracting Activities Support**

6. Major Regional Conflicts. These are conflicts where hostilities are ongoing, imminent or likely and where there is a substantial commitment of US military forces. Operation Desert Shield and Operation Desert Storm are examples of Major Regional Conflicts.

7. Lesser Regional Conflicts. These are also conflicts involving ongoing, imminent or likely hostilities involving the US military, but where there is a less than substantial commitment of forces. Operation Just Cause (Panama) is an example of a Lesser Regional Conflict.

8. Military Operations Other Than War (MOOTW). Per Joint Publication 3-0, MOOTW encompass a wide range of activities where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war. Although MOOTW are usually conducted outside the US, they also include military support to US civil authorities. Joint Publication 3-0 lists the following categories of MOOTW: Arms Control, Combating Terrorism, Counterdrug Operations, Nation Assistance, Noncombatant Evacuation Operations, Civil Support Operations, Peace Operations, and Support to Insurgents. Operations Provide Comfort (Northern Iraq), Uphold Democracy (Haiti) and Joint Endeavor (Bosnia) are examples of the dozens of MOOTW conducted in recent years.

9. Domestic Disaster/Emergency Relief. Technically a subset of MOOTW, a distinction is drawn for the purposes of this course. Domestic disaster/emergency relief operations can range from domestic natural and man-made disasters to civic disturbances to terrorist activity within the US. DoD missions in the area of disaster relief include efforts to mitigate the results of natural or man-made disasters such as hurricanes, earthquakes, floods, oil spills, riots, and air, rail or highway accidents. DoD support to Hurricanes Hugo, Andrew and Marilyn are examples of Domestic Disaster/Emergency Relief.

10. Exercises. Routine military exercises may feel anything but “routine” to the CCO supporting them. Anyone who has participated in a COBRA GOLD, BRIGHT STAR, TEAM SPIRIT, National Training Center rotation or similar exercise, will attest that there is a very definite sense of urgency and intense mission pressure connected with them. However, there is

not the urgency, pressure or risk to life or national interests associated with the four *types* of contingency contracting operations discussed in paragraphs 6-9 above. Moreover, they do not qualify as “declared contingencies” and generally receive no special consideration for other forms of relief discussed in this text. Within the military community we preach, “train as you fight”; but with respect to contracting, senior Executive Branch policy makers and the Congress have been reluctant to allow this. CCOs must be fully cognizant of the distinction between what is contractually permitted in an actual contingency and what is permitted in an exercise preparing for such a contingency.

11. Mature vs. Immature Contracting Environments. This is a useful, conceptual classification of the area of operations the CCO will be supporting. These classifications are described below.

a. Mature. A mature contracting environment is one characterized by: a sophisticated distribution system that can rapidly respond to changing requirements and priorities; sufficient vendors who can comply with FAR requirements in order to meet contingency contracting demands and have previous experience contracting with the US government; and, in the best case, where there is an existing DoD contracting office or structure in place. Examples of mature contracting environments include Kuwait, Saudi Arabia, Korea, and western Europe.

b. Immature. An immature contracting environment is an area with little or no built-up infrastructure, few vendors and of the available vendors few, if any, have previous experience contracting with the US. Examples of immature contracting environments include Somalia, Haiti, and Rwanda.

c. CCOs must consider the “maturity factor” in planning for contingency operations. Clearly it would be unrealistic, if not an outright waste of time, to pursue the same FAR/DFARS waivers, deviations and exemptions for a contingency operation in western Europe as for an operation in Somalia. Regardless of the nature or location of the contingency operation, CCOs will be expected to comply with the spirit and letter of existing law and regulation to the fullest extent possible consistent with mission accomplishment.

### **Phases of Contracting Support During Contingencies**

While not all operations will follow the temporal framework outlined below, this is a useful framework for conceptualization and discussion of the contracting actions necessary to support contingencies.

12. Phase I: Mobilization/Initial Deployment. This is normally the first 30-45 days of a deployment and is characterized by an extremely high tempo, confusion and controlled chaos. The CCO’s number one priority will be *responsiveness* to basic life support requirements: billeting, food service (including potable water), transportation and equipment rental, ground fuel, laundry and bath services, refuse and sanitation services. During this phase the CCO may find themselves in the undesirable position of being the requester, approving official, certifying officer and transportation office for deliveries. Detailed planning can preclude some of these “additional duties”. However, physical limitations on the number of support personnel deployed in the early stages of a contingency will require a high degree of flexibility on the part

of the CCO. Oral orders, use of IMPAC and SF 44s/cash payments will be the predominant contracting actions.

13. Phase II: Build-Up. This phase is characterized by a reception and bed-down of the main body of deploying forces. In this phase, additional contracting personnel will generally arrive with their units, though not necessarily a rate commensurate with the number of troops to be supported. The CCO's priorities during this phase will continue to be responsiveness to life support requirements, but attention must also be given to:

- a. Gaining effective command and control over contracting and contracting support personnel.
- b. Establishing a vendor base.
- c. Putting requisitioning, funding and contracting controls and procedures into place.
- d. Establishing Non-Appropriated Funds (NAF) contracting procedures to support quality of life programs (where applicable).
- e. Establishing Blanket Purchase Agreements (BPAs), consolidating requirements into purchase orders and contracts rather than using a high volume, and physically time consuming SF 44 cash transactions by the CCO.
- f. Establishing an Ordering Officer (OO) network with effective control measures.

14. Phase III: Sustainment. This phase provides contracting support from the completion of the build-up phase until redeployment begins. The contracting activity will expand into contracts for additional quality of life, more permanent facilities and equipment, additional office supplies, and discretionary services. The CCO's priorities during this phase will be:

- a. Establishing long term contracts (IDIQ, additional BPAs) and consolidating requirements wherever possible to achieve economies of scale, reduce cost, and mitigate risk.
- b. Improve documentation of contracting actions and internal controls.
- c. Increasing competition and depth within the vendor base, to include off-shore sourcing for items/services not available within the immediate area.
- d. Planning for transition to follow-on forces or termination and redeployment.

15. Phase IV: Termination/Redeployment. This phase will be characterized by significant pressure and urgency to "send the troops home". Typical new requirements include: packing, crating and freight services; construction and operation of washracks for vehicles; commercial air passenger services (if TRANSCOM is not providing this). The CCO will be required to terminate and closeout existing contracts and orders. Ratifications and claims must be processed to completion. Contracting for life support services must continue until the last troop leaves. When a follow-on force is required, the CCO must prepare contracts and files for

delegation/assignment to the incoming contracting agency (DCMC, UN, etc.). As a CCO you can count on being the last to leave!

16. Contracting During Hostilities. Hostilities may break out during any phase of a contingency - and if the operation is a non-permissive forced entry, the lead will be flying from the very beginning. The more rapidly the CCO “matures” the contracting operation, the better support they will be capable of providing when hostilities do occur. However, some problems are unavoidable: Contractor employees may not report for work, abandon the job site or refuse to drive vehicles in certain areas; vendors and shops may close during hours of darkness or completely; the threat of snipers, terrorists and enemy action against the CCO while traveling in the local community increase significantly. The CCO must advise supported units of these likelihoods so they can plan to perform essential contracted tasks with military manpower, or do without.

### **Waivers, Deviations and Expedited Contracting Procedures in Contingency Contracting Operations**

17. General Assumptions. Several general assumptions can be made about the performance of the CCOs mission:

a. Regulatory and statutory requirements will be relaxed to the extent permissible, practicable and *necessary*. The more serious the contingency, the more relaxation of rules the CCO can expect.

b. Virtually all services, supplies and construction requested during a contingency will be of an urgent, high priority nature.

c. Deployed CCOs will be given the requisite authority to accomplish the mission assigned. When this is not the case, it will generally be due to a lack of knowledge, on the part of the contracting chain, about either the mission requirements or the CCO’s authority.

d. Certain authority/responsibility that can be delegated to the CCO, will be delegated to the CCO. This ties into the previous paragraph. It is incumbent upon the CCO to *ask* for the authority they need to support the mission; it is not smart for the CCO to passively expect higher headquarters to anticipate their needs on the ground.

18. Overarching Limitations.

a. Regardless of what FAR/DFARS requirements are waived, the CCO will still be bound by the same limits as all service members participating in contingency operations. Examples of limitations generally outside the control of the contracting chain are: CINC General Orders; Host Nation Agreements; Status of Forces Agreements; treaties; and Inter-Service Support Agreements.

b. The statutory prohibition on contracts with cost-plus-percentage-of-cost provisions has never been waived for any contingency; its unlikely it ever will be waived.

19. War and Emergency Legislation.

a. Defense Production Act and Defense Priorities and Allocation System (DPAS). In accordance with the Act and Executive Order, DoD may require certain contracts in support of the national defense (rated orders) be accepted and performed on a preferential basis over all other contracts. This authority was used extensively to expedite contracts placed with US firms in support of Operations Desert Shield and Desert Storm. This Act is *not applicable* to foreign vendors and will have little impact beyond the domestic industrial base. FAR Part 11.6 and DFARS 211.6 provide guidance on DPAS. It is important to note that the overall program is under the direction of the Department of Commerce. Also significant is the fact that only individuals specifically delegated authority to assign DO or DX priority ratings to a contract may do so. Generally, contracting officers do not have this authority. Rather, requiring activities (designated in DoD Instruction 4400.1) place the DO or DX rating on the purchase request and the contracting officer then incorporates the assigned rating on the resulting contract.

b. Extraordinary Relief (FAR Part 50). This law is designed to provide the authority necessary to meet various contingencies. As such, CCOs should be notified before deployments exactly what, if anything, has been authorized before using this authority.

(1) A question often raised is, “Which statutory requirements can we count on being waived during actual contingencies?” A complete reading of Defense Resources Act sheds little light as to the specific laws which may be waived. However, two excerpts from the act reveal how far-reaching and all-encompassing potential waivers could be:

“Sec. 401. The President may authorize any agency of the Government exercising functions in connection with the national defense to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress or other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the performance of the national defense functions of such agency; except that this title does not authorize the use of the cost-plus-a-percentage-of-cost system of contracting or any contract provision in violation of law relating to limitation of profits.”

“Sec. 1214. Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period during which this Act shall be in force.”

(2) These sections make it appear CCOs will have unlimited authority to write contracts any way they see fit. However, a word of caution on three points. First; implementing legislation of the Act could change or modify this language. Second, the Act may not be invoked at all for any given contingency. Finally, CCOs are still required to adhere to sound contracting principles to the extent possible and contracting records are subject to audit. Moreover, the Act spells out specific penalties for negligent abuse of broad authorities granted during emergencies. The bottom line is CCOs will be given the authority to get the job accomplished, but they must thoroughly document reasons for not following normal procedures.

(3) FAR Part 50 and DFARS Part 250 implement 29 USC 1431 and Executive Order (EO) 10789 concerning granting of extraordinary contractual relief to facilitate the national defense. The statute and EO require that such actions at or above \$50,000 must be approved at or above the level of an Assistant Secretary or his deputy. DoD has implemented this through the use of Contract Adjustment Boards headed by such an official. The high level of approval for actions at or above \$50,000 removes any practical utility of this authority for the CCO. However, authority to approve extraordinary relief actions below \$50,000 are not limited by statute or EO. The DFARS limits exercise of this authority to the HCA - depending on the nature of the contingency and the contracting command and control structure this official may be within “reach” for a CCO. Further, DoD has authority to waive DFARS 250.201 limitations (which delegate this authority no lower than the HCA) on either a one-time or class basis. Such a waiver could provide Extraordinary Relief authority of less than \$50,000 to the COCO level.

20. Existing Authority to Expedite Contracting Actions.

*See the FAR/DFARS citations listed in the student Reading Assignment for this unit.*

21. Additional Delegations of Authority that May Apply. The senior CCO supporting a contingency should consider requesting that the following authority be delegated to him in order to expedite contracting support:

- a. Exercise “level above the contracting officer” and “chief of the contracting office” approvals as specified in the FAR/DFARS/service supplements.
- b. Appoint Ordering Officers.
- c. Approve J&As for other than full and open competition under FAR 6.302-1 (only one responsible source) and FAR 6.302-2 (unusual and compelling urgency).
- d. Ratify unauthorized commitments up to the SAT.
- e. Approve entering into letter contracts IAW FAR 16.603-3.
- f. Reappoint contracting officers from other services/commands up to their existing level of authority (when required).
- g. Authority to approve one-time deviations from the FAR/DFARS and service supplements in accordance with DFARS 201.402(1)(ii)(2) and agency procedures.
- h. Other authority tailored to the particular contingency.

22. Acquisitions in Foreign Countries.

a. In addition to the specific waivers, deviations, exemptions and delegations discussed in paragraphs 19-21 above, there are a significant number of statutory and regulatory provisions



that are at all times inapplicable to acquisitions *in foreign countries, from foreign sources, for delivery/performance in a foreign country.*

b. The general rule of thumb is that US socio-economic laws and regulations do not apply in foreign countries. Examples include, but are not limited to, EEO, small business programs, affirmative action programs, drug-free workplace, Buy American, International Balance of Payments, OSHA-based requirements (caution: this generally does apply for work performed on US owned or controlled property), and the Davis-Bacon, Walsh-Healy and Service Contract Acts.

c. However, before throwing caution to the wind, CCOs must ensure that all the conditions emphasized above are met. Further, international agreements and treaties often require the US to observe similar socio-economic host nation laws when contracting within their boundaries.

### 23. Federal Acquisition Reform Act of 1996 (FARA).

The rising tide of acquisition reform, which began with the Federal Acquisition Streamlining Act of 1994 (FASA), continues to lift all ships. Several provisions of FARA may directly benefit CCOs.

*Caution: At the time this text was prepared, none of the provisions below had been implemented in FAR or DFARS regulations.*

a. J&A Thresholds. Congress significantly raised the approval levels for justifying the use of other than full and open competition. Contracting officers may now approve J&As for acquisitions up to \$500K. For acquisitions over \$500K, the following approval levels apply:

(1) More than \$500K but equal to or less than \$10M - the competition advocate.

(2) More than \$10M but equal to or less than \$50M - the head of the contracting activity.

(3) More than \$50M - the agency senior procurement executive.

b. Posting of Notices for Acquisitions under the SAT. The threshold for the requirement to post notices of acquisitions in a public place was raised from \$5K to \$10K.

c. Three-Year Test of Simplified Acquisition Procedures for Purchase of Commercial Items up to \$5 Million. This change could revolutionize the way we procure commercial goods and services and promises tremendous flexibility to the CCO. The new legislation requires contracting officers to use simplified acquisition procedures for purchases of commercial supplies and services (anything other than real property) with a value between \$100K and \$5M if the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, prospective vendors to offer only commercial items. This authority is limited to a three-year test period beginning on the effective date of the implementing FAR regulations. As virtually all goods and services procured by CCOs (excluding leasing of

real property) are of a commercial nature, this could virtually eliminate the use of IFBs and RFPs in contingency operations.

d. Clarification of Micropurchase Authority. FARA clarified an issue concerning determinations of price reasonableness for micropurchases. Under the new guidance, any federal employee (military or civilian) properly authorized to make micropurchases can make the required price reasonableness determination.

### **WHAT DOES IT ALL MEAN?**

A review of these emergency authorities may lead one to conclude adequate authority exists within current regulations and laws to be able to provide expedited contracting support with few problems. Indeed, many legal and regulatory requirements which slow down the acquisition process in peacetime are not applicable to emergency contracting in a foreign country. Supply, service, and construction requirements under the SAT, which will likely constitute over 95% of the requirements, can be consummated quickly.

There are several pitfalls and legal shortcomings which CCOs should be aware of so they can be dealt with properly. First of all, care must be taken on how to apply this potential “relief” to peacetime exercises. Ideally, services should practice in peacetime the way they plan on operating in war. However, using some of these exceptions in peacetime could subject the CCO to criticism for overstepping legal boundaries. Secondly, these exceptions deal mainly with administrative aspects of contracting -- not the actual written contract itself, nor the enforcement of it. For instance, what does the CCO do if a contractor refuses to sign or otherwise accept a written purchase order or contract and demands cash instead? Lastly, there are several statutory and regulatory problems that are unaffected by any existing relief. For example, all contracts over the SAT, require many clauses which most vendors find objectionable: Examination of Records, Disputes, and the Changes clause just to name a few. Again the question, what is to be done if the only source for a requirement refuses to accept a contract with mandatory clauses which are objectionable or insulting?

While actions may have been initiated to obtain necessary class deviations and legislative relief, CCOs must be prepared to support our deployed forces within the confines of existing laws and regulations.